AUG 26 2010

NO. 10-74

In The Supreme Court of The United States

JAVIER RIVERA AQUINO, SECRETARY,
PUERTO RICO DEPARTMENT OF AGRICULTURE, *ET AL.*,

Petitioners,

v.

SUIZA DAIRY, INC., *ET AL.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The petition before this Court seeks review of a judgment by the Court of Appeals for the First Circuit affirming a preliminary injunction in a still ongoing case. The portion of the remedy to which petitioner objects has not been yet fully implemented. In that context, the substantive questions presented are:

1. Whether the Eleventh Amendment applies to the unincorporated territory of Puerto Rico as it does to any State of the Union.

2. Whether a federal court can order a territory that has decided to regulate its milk market, to provide, in the rates to be set prospectively for payment of milk by consumers, a charge to reconstruct the regulated entity's capital that was depleted by the unconstitutional actions of the territory, without violating the Eleventh Amendment.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court of the United States, respondent Suiza Dairy, Inc. ("Suiza") states that it is not a publicly held corporation that issues stock. Its parent corporation is Grupo Gloria Holding Corp., an entity not publicly held.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Blank Page

Blank Page

Statutes and Constitutional Provisions:

Miscellanous:

Blank Page

I. STATEMENT OF THE CASE

This complicated regulated market case is still pending final resolution before the U.S. District Court for the District of Puerto Rico. As of today, the case is nearly six years old, and it continues in its preliminary injunction phase, despite a docket consisting of more than 1600 entries. Many preliminary injunction issues remain unresolved. In particular, the remedy that petitioners submit is offensive to the Eleventh Amendment has not been fully implemented. *See* Pet. App. at 50a f/n 3. Neither the amount of the regulatory accrual remedy, nor its precise mode of calculation or the recovery schedule have been set. *See* U.S.D.C. Dkt. Nos. 1512, 1547, 1577, 1619, and 1662. *See also* Suiza's App. at A-2, A-13 to A-15.

This case arises out of the decision made by the Government of Puerto Rico to regulate the Puerto Rico milk market. The Puerto Rico Milk Regulatory Agency ("ORIL") forces the fresh milk processors to operate within a range controlled by ORIL. ORIL determines the price at which processors can purchase raw milk and the price at which they can sell finished product to their clients. *See* Pet. App. at 5a. Because of the *de facto* control of the dairy farmers over ORIL, the price of raw milk was kept high while

the price of processed fresh milk was kept low. *See* Pet. App. at 5a-6a, 91a, and 93a-94a.[1]

Acting on respondents' petition for a preliminary injunction, the District Court held 51 intensive evidentiary hearings over the course of one and a half years. On July 13, 2007 the District Court granted a preliminary injunction. *See* Pet. App. at 12a. The Court found that ORIL had committed numerous constitutional violations that are painstakingly detailed in the Court's ninety-five page Opinion and Order. The same contains 239 footnotes with specific references to the factual record developed.

In relation to the issues raised by the petition for certiorari, the District Court concluded:

> The regulatory system of ORIL has created for the fresh milk processors yearly losses that have *consistently diminished their capital base.* The normal regulatory way of dealing with this issue is by creating a capital account of "regulatory accrual" *that would add to the capital base the erosion experienced because of this regulatory system.* By providing in future rates a rate of return *over the capital plus the capital losses,* the companies could be made whole and be

[1] Not a single factual determination of the District Court was ever challenged by petitioners. *See* Opinion of the Court of Appeals, Pet. App. at 3a f/n. 1.

> *provided the necessary recovery of cost and reasonable profit.* (Emphasis added, footnotes referring the record omitted).

See Pet. App. at 118a.

The District Court also found that:

> ORIL has failed to follow these principles and has intentionally squeezed plaintiffs between the gap of a fixed regulated price and an irrational high price for raw milk. ORIL has intentionally issued this administrative measure in order to protect Indulac[2] in the competition with the local fresh milk industry and the continental importers. The evidence shows, from admissions of the farmers, that ORIL's price fixing scheme is designed to fulfill these goals.

See Pet. App. at 168a.

Moreover, the Court found that ORIL continuously and arbitrarily changed its regulatory position in order to allow and disallow costs to manipulate figures and squeeze respondents between a high price for raw milk and an artificially low price for processed milk. *See* Pet. App. at 123a. The "lack of regulatory rules has been the

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[2] A milk processor controlled by the dairy farmers. *See* Pet. App. at 81a-82a.

instrument through which plaintiffs have been denied the recovery of their costs, as well as a 'fair profit' in the fresh milk business". *See* Pet. App. at 167a.

In order to address that situation, the preliminary injunction in essence orders ORIL to establish any further regulation and milk prices on the basis of scientific, non-discriminatory, rational and fair standards. Presumably, those standards will result in a fair evaluation of respondents' operational costs for purposes of cost recovery.

But as the District Court recognized, in a regulated market respondents also have the constitutional right to be allowed to receive a reasonable profit over the recovery of operational costs. That profit is calculated by ORIL by applying a rate of return percentage figure to the capital base of respondent. The undisputed evidence presented during the compliance hearings of this preliminary injunction is that respondents' combined capital stood at minus $5 million. *See* Pet. App. at 24a. This negative figure is the result of the capital base diminution arising out of ORIL's unconstitutional actions. *See* Pet. App. at 118a.

In order to reconstruct respondent's capital base and provide a rate of return over equity in prices going forward ("reasonable profit"), ORIL was ordered to adopt the customary method of capital reconstruction in regulated markets known as "regulatory accrual". This regulatory accrual takes

the form of an additional amount that respondents are allowed to charge their customers for processed milk during a set period of time. The capitalized total figure is added to the base of capital for purposes of applying the adopted return on equity percentage going forward. The outcome of those operations is the final price to be paid for processed fresh milk by the clients of respondents. After a certain period, the regulatory accrual remedy disappears from the milk price.

The preliminary injunction does not mandate ORIL "to allow respondents to recover a higher rate of return going forward." Pet. Brief at 4. The injunction does not set any particular rate of return. Rather, the injunction simply orders the adoption of adequate standards that will allow ORIL to "determine cost and fair profit return for all the participants in the Puerto Rico regulated milk market", Pet. App. at 197a, whatever those are.

The regulation promulgated by ORIL imposing a 1.5¢ surcharge over the price of milk but ordering respondents to deposit said portion of the price collected from their clients in a segregated account at ORIL is not a provision "[i]n compliance with the district court's order." Pet. Brief at 4. The District Court never ordered ORIL to become custodian of a portion of the milk price collected by respondents from their clients. ORIL decided to do so on its own thus precluding respondents' immediate access to a portion of the preliminary injunction remedy. *See* Suiza's App. A-4 to A-8.

As the Court of Appeals correctly indicated, according to the District Court's order, the price paid by the milk clients would be neither collected by government entities nor deposited in the Commonwealth's treasury. "Apart from the initial price order, no state action is required to implement this remedial scheme, which would, in no way, reach the coffers of the Commonwealth." *See* Pet. App. at 26a.[3]

Petitioners requested the Court of Appeals to retain the mandate. Suiza filed its opposition, Suiza's App. A-1 to A-15, and the Court returned the mandate by a unanimous vote.

II. REASONS FOR DENYING THE PETITION

A. There are no reasons justifying review of this interlocutory decision.

Ordinarily, this Court does not issue a writ of certiorari to review a decree of a circuit court of appeals on appeal from an interlocutory order. *American Construction Co. v. Jacksonville, Tampa and Key, W. R. Ry. Co.*, 148 U.S. 372, 384 (1893). This case presents no extraordinary circumstances that would justify issuing the writ before the final decree. *Hamilton-Brown Shoe Co. v. Wolff Brothers*

[3] It is simply to misconstrue the remedy to say, as the *Amici* Brief does, that the Court of Appeals approved of an order "compelling [Puerto Rico] to collect and deposit funds into a specific account earmarked for retrospective monetary relief." *See Amici* Brief at 3 and 8.

& *Co.*, 240 U.S. 251, 258 (1916); *Denver v. New York Trust Co.*, 229 U.S. 123, 133 (1913). *See* also *Virginia Military Institute, et al. v. United States*, 508 U.S. 946 (1993). The petition does not even address this issue.

That finality rule is of particular importance in this case since the District Court is still in the process of implementing the preliminary injunction issued more than three years ago. As we have said before, the regulatory accrual remedy under attack by petitioners here has not been implemented in full, and key decisions regarding its operation remain to be made. An additional record is in the process of development. The Court should not enter into the issues raised by the petition on the basis of an incomplete record and without allowing the District Court to finish its business in connection with the remedy in question. Issuing the writ at this time will induce the inconvenience, litigation costs and delay in achieving ultimate justice that frequently accompany interlocutory appeals. *See Johnson v. Jones*, 515 U.S. 304, 309-310 (1995). *See* also E. Gressman et al., *Supreme Court Practice* 82 (9th ed. 2007).

B. This case is not suited for this Court to decide now the narrow and local issue of whether the Eleventh Amendment applies to Puerto Rico.

This Court has never decided whether the Eleventh Amendment applies to the unincorporated territory of Puerto Rico to the same extent that it does to the States of the Union. That is an issue that goes to the core of the relationship between Puerto Rico and the United States. *See Downes v. Bidwell*, 182 U.S. 244 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); E. Rivera Ramos, *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico* (2001); J. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* (1985); J. Trías Monje, *Puerto Rico: The Trials of the Oldest Colony in the World* 36-51 (1997); C. Burnett and B. Marshall (eds.), *Foreign in a Domestic Sense: Puerto Rico, American Expansion and the Constitution* (2001); J. Kerr, *The Insular Cases: The Role of the Judiciary in American Expansionism* (1982); Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to US Territories*, 59 U. Chi. L. Rev. 779 (1992); Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. Marshall L. Rev. 55 (1997).

This was not an issue in the Court of Appeals because, as petitioners correctly recognize, the Court of Appeals for the First Circuit has consistently

decided, for over a quarter century, that the Eleventh Amendment applies in full force to Puerto Rico. *See* Pet. Brief at 7-8, f/n 1. As demonstrated by the case petitioners themselves cite, *Ezratty v. The Commonwealth of Puerto Rico*, 648 F.2d 770 (1st Cir. 1981), that conclusion was reached with practically no explanation. *Id.* at f/n 7. But if this Court is to impose such a serious limitation to the power of Congress over Puerto Rico under the Territorial Clause of the U.S. Constitution, a thorough analysis of the unique political status of Puerto Rico will certainly be required. *Cf. Calero Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974) (discussing the evolution in Puerto Rico's status since the end of the Spanish-American War in 1898).

To provide the remedy that petitioners seek, this Court cannot operate under the "assumption" that the Eleventh Amendment applies to Puerto Rico as petitioners invite it to do. *See* Pet. Brief at 7-8, f/n 1. This Court operated under that assumption in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 141 n.1 (1993). But the question there was entirely different. The only matter that this Court had to decide, and decided in that case, was whether an order denying a motion by a state or a state entity to dismiss a civil action on grounds of immunity from suit in federal court, under the Eleventh Amendment, was immediately appealable under the collateral order doctrine. The Court of Appeals had responded in the negative and had dismissed that appeal on jurisdictional grounds.

This Court reversed, holding that there was no jurisdictional impediment to the consideration of the Eleventh Amendment claim of Puerto Rico in that context. But the Court of Appeals had not reached the merits of the Eleventh Amendment claim and this Court had no need to do so in order to resolve the jurisdictional issue before it.

That is certainly not a way out of this case. If, as petitioners submit, a portion of the preliminary injunctive remedy affirmed by the Court of Appeals should be annulled on the basis of the Eleventh Amendment defense of Puerto Rico, a holding that said amendment limits the power of Congress under the Territorial Clause of the Constitution needs to be made first.[4] For reasons already stated, this is hardly the case for such a narrow but difficult question to be entertained. *Cf. Harris v. Rosario*, 446 U.S. 651 (1980) (holding that Congress may treat

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[4] Consistent with its long standing position, the Court of Appeals here ruled on the merits of ORIL's Eleventh Amendment claim construing the same as it would have had the claim been made by a state. In that context, it is irrelevant that "[r]espondents have not disputed the proposition that Puerto Rico is entitled to sovereign immunity at any stage of this litigation..." (Pet. Brief at f/n. 1) since that determination is the cornerstone of the decision appealed. Furthermore, "...even if this were a claim not raised...below, we would ordinarily feel free to address it, since it was addressed by the court below." *Lebrón v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995). There is no way of escaping the reach of what petitioners want this Court to rule in the context of this interlocutory appeal.

Puerto Rico differently than it does a state in public welfare programs because of the Territorial Clause).

C. The decision of the Court of Appeals is consistent with the Eleventh Amendment precedents of this Court, since the injunction imposes no actual or potential monetary liability upon Puerto Rico.

The Court of Appeals explained very clearly why its decision was consistent with the Eleventh Amendment precedents of this Court. For the sake of brevity we abstain from repeating those arguments here and invite the Court to examine the analysis contained in the Court of Appeals' Opinion, Pet. App. at 24a-28a, and the Opinion of Judge Torruella concurring in the denial of *en banc* review, Pet. App. at 46a to 54a. The key element is that the monies of the remedy are strictly private in nature and that petitioners never argued that they are in any way public funds. *See* Pet. App. at 49a.

As the Court of Appeals correctly indicated:

> [Petitioners] provide no support for their contention that retrospective relief *that does not reach the state treasury* is barred by sovereign immunity. Rather, the cases cited by defendants, including *Edelman*, involve requests for retroactive compensation that would invariably come out of state treasuries. *See, e.q., id.*, at 667 ("[Relief sought] requires payment of state funds, not

> as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation...."); *Papasan v. Allain*, 478 U.S. 265, 279 (1986) (plaintiffs sought funds directly from the state to fund school districts).

See Pet. App. at 25a. Emphasis in the original.

Petitioners rely heavily on *Regents of the University of California v. Doe*, 519 U.S. 425 (1997). That case provides no support for petitioners' position. In *Doe*, plaintiff sought to obtain payment of damages from the State fisc of California. The disbursement for payment would have come from State coffers but for an indemnity agreement with the federal government that made the latter responsible for said payment. *Doe* stands for the proposition that if the State is obligated to pay retroactive damages from its own coffers, the fact that a subsidiary source of funds, such as an indemnity agreement or an insurance policy exists, does not defeat the Eleventh Amendment defense.

But that is not the situation here. The Government of Puerto Rico has not been ordered to pay one single cent, be it from its coffers or anywhere else, to respondents. This preliminary injunction simply provides that if the Government of Puerto Rico decides to continue regulating milk prices on the island (a choice Puerto Rico is free to make either way), then it has to regulate prices

prospectively providing for the reconstruction of respondents' depleted capital in order to allow them to recover costs and make a reasonable profit. There is absolutely no indication in the injunction that the price for milk that the consumers would be paying is *in lieu* of a payment that otherwise would come from State coffers. That is clearly distinguishable from the situation in *Doe* in which *but for* the indemnity agreement with the federal government, the State of California would have been responsible for the judgment sought by plaintiff. *See* Pet. App. at 49a-50a.[5]

It is precisely by looking "... to the substance rather than to the form of the relief sought," *Papasan v. Allain*, 478 U.S. 265, 279 (1986), as petitioners invite this Court to do (Pet. Brief at 9), that the Court of Appeals correctly reached the conclusion that its holding was not in opposition to this Court's holding in *Doe*.

Green v. Mansour, 474 U.S. 64 (1985) does not support the position of petitioners. Relying on *Quern v. Jordan*, 440 U.S. 332 (1979) plaintiffs in *Green*

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[5] To say, as *Doe* holds, that a state doesn't lose its immunity because the federal government pays *in lieu* of the state does not imply, as the *Amici* Brief suggests at p. 17, that the State can *transfer* its immunity to a private entity by agreeing voluntarily to pay in its place. A federal indemnity is not a transfer of federal immunity to the State. Similarly, a voluntary payment by the State on behalf of a third party may be a waiver of its immunity but not a transfer of the same to a non-sovereign. That argument by the *Amici* is a *non-sequitur*.

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were seeking declaratory judgment that past actions of State officials violated federal law. But, at the time this remedy was sought, there was indisputably no ongoing violation of federal law. Without an ongoing violation of federal law no prospective remedy was possible. In that context, the declaratory judgment would only have served:

> ... as *res judicata* on the issue of liability, leaving to the State courts only a form of accounting proceeding whereby damages or restitution would be computed. But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full fledged award of damages or restitution [against the State] by the federal court, the latter kind of relief being, of course, prohibited by the Eleventh Amendment.

Green at 73. At the time of the issuance of the preliminary judgment and as of today, there is a continuing violation of federal constitutional law in this case.

Puerto Rico's treasury is not compromised by this preliminary injunction now or in the future. If Puerto Rico were to deregulate the prices of milk, a decision that only Puerto Rico can take, the obligation to provide for a recapitalization remedy in the prospective rate would disappear. Whatever capital or revenue requirements respondents may then have, would be satisfied from the price they

charge for their product as determined by market forces. But even if Puerto Rico were to continue regulating the market and the increase in price would lead the consumers to reduce their purchases of milk, that would prolong the period the recapitalization of respondents' would take, but would not in any way compromise Puerto Rico's coffers. The preliminary injunction required Puerto Rico to prospectively set the price of milk, which it has decided to regulate, by the method customarily used to redress depleted capital problems in regulated markets. It does not require Puerto Rico to force consumers to buy milk, much less pay for milk with public funds if the consumers refuse to do so with their own.

D. The decision of the Court of Appeals is not in conflict with those of other circuits.

Petitioners submit that the interlocutory decision of the Court of Appeals here is in conflict with decisions from several other circuits. That contention is incorrect.

Esparza v. Valdez, 862 F.2d 788 (10th Cir. 1988) deals with a claim for unemployment benefits to the State of Colorado. Colorado, as many other states, operated its unemployment benefits program under the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§3301-3311. That is a scheme by which the federal and state governments cooperate to provide

assistance to unemployed workers. As the Court correctly indicates:

> Under FUTA, the federal government helps States fund the cost of administering unemployment compensation programs while leaving most of the actual raising and all of the paying out of benefit monies to the States.

Id. at 789.

After recognizing that "... some district courts and one circuit have allowed plaintiffs to sue a State in federal court for recovery of past unemployment claims, principally on the grounds that the State's unemployment compensation fund is a special, segregated fund as distinguished from a general revenue fund", the Tenth Circuit rejected the operational validity of the distinction between one fund and the other. The Court held that said distinction between "general" or "special revenue" fund (both holding public monies), from which the State would have to pay unemployment benefits, does not preclude application of the Eleventh Amendment.

Paschal v. Jackson, 936 F.2d 940 (7th Cir. 1991) is a very similar case dealing also with a claim for retrospective unemployment benefits. Again, plaintiffs were seeking disbursement of public funds segregated in a special account. The consideration for which public funds would be disbursed was the

past unemployment status of claimants. Since public funds were to be disbursed, the Seventh Circuit, like the Tenth, found irrelevant for Eleventh Amendment purposes the particular account in which the state kept these public funds. The Court found irrelevant "the source of State funds" provided that the disbursement was of "state funds", which unemployment benefits always are.

Cronen v. Texas Department of Human Services, 977 F.2d 934 (5th Cir. 1992) is also a similar case which deals with a claim for retrospective welfare, instead of unemployment, benefits. In this case, Cronen sought restoration of past food stamp benefits that, according to him, were denied improperly. In short, Cronen's claim was based on his legal right to have State funds paid to him, on account of meeting certain poverty related criteria. As it is pertinent here, the Court simply upheld an Eleventh Amendment defense against the disbursement to plaintiff of State funds although those were of federal origin. Interestingly, the Court intimates that plaintiff's argument may have been successful had it filed suit, not against the State itself but as respondents here, against the State officials in their official capacity. *See Cronen, supra* at 938.

In *Florida Association of Rehabilitation Facilities, Inc. v. Florida Department of Health and Rehabilitative Services*, 225 F.3d 1208 (11th Cir. 2000) a claim on behalf of disabled people was made against State officials. The District Court directed

defendants to correct their Medicaid reimbursement plan prospectively and retrospectively. The Court of Appeals reversed the part of the judgment that required the State to pay money for pre-judgment violations. Again, these Medicaid funds were undoubtedly State funds that had to be disbursed by the State to redress pre-judgment claims. As the Court itself said, "... we note that the judgment clearly does contemplate the payment of State funds to redress prior inadequate reimbursements." *Id.* at 1220.

Finally, in *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) the Court was dealing with a claim by certain state court judges that the State of Michigan was violating the Federal Equal Protection Clause by giving more favorable retirement benefits to other state court judges. The retirement system of the State was a product of State legislation, run by State officials and funded by the State treasury. The Court upheld the Eleventh Amendment defense finding irrelevant the fact that the State retirement funds in question were kept in a State "pocket" different than that of the State's general funds.

These cases are clearly distinguishable from the case at bar. Unemployment, welfare, Medicaid, disability and retirement pensions are all obligations of the State payable with State funds regardless of the origin of said funds or the particular account in which they are kept. All of the above cases reject those origin and fiscal deposit distinctions when it comes to the Eleventh Amendment.

But that is not at all the situation of this case. Before Puerto Rico decided to regulate milk prices, retailers and consumers would pay respondents for processed milk at a price set by market forces. The money paid did not constitute State funds but money paid by a private citizen to a private entity in exchange for goods. After Puerto Rico decided to regulate the price to be paid, in the exercise of Puerto Rico's police power, that money continued to be paid in exchange for the processed milk of respondents and did not alter its strictly private character at all. It continued to be money paid for milk belonging to private parties and not State funds of any sort. Petitioners nor *Amici* cite any authority for the proposition that whenever the State engages in rate making, the nature of the payment for the regulated commodity changes from private money to "State funds". *See Amici* Brief at 18.

In essence, for years, the milk consuming public received the benefit of the unduly low price of fresh milk caused by ORIL's unconstitutional actions. Now, it is that public's private money that will be used to procure constitutionally valid prospective rates through recapitalization. In a deregulated market that result would be achieved through a price hike freely determined by respondents. But since Puerto Rico continues committed to price regulation, the regulatory accrual remedy becomes necessary. But the liability for that remedy does not

fall upon the government but upon the milk buyers, as it would in a deregulated market.[6]

E. The decision of the Court of Appeals is correct.

As Suiza has shown above, the Court of Appeals did not rule as it did because the monies in question here did not come "directly from the general treasury". Pet. Brief at 16 and *Amici* Brief at 2. It ruled as it did because the funds in question do not come directly **nor** indirectly from the general treasury since they are strictly private monies paid to private parties in order to buy from them a particular commodity.[7] But there are other reasons why this petition should be denied. In compliance

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[6] The preliminary injunction does not require ORIL to do anything other than take into consideration the regulatory accrual elements in setting the new price going forward. ORIL is not required by the preliminary injunction to interfere or participate in the collection of monies, nor deposit them in a government account or distribute the same. The money continues to be collected by respondents. ORIL on its own has ordered respondents to send back to ORIL for "deposit" the regulatory accrual monies. *See ante* at 13-15 and Suiza's Motion in Opposition to Motion for a Stay of Mandate, Suiza's App. at A-4 to A-10. The 1.5¢ surcharge was not "judicially imposed", *Amici* Brief at 12, but unilaterally determined by ORIL in that same administrative order.

[7] There is no basis for the statement by *Amici* at 18 that "...the reason the milk surcharge would not reach the public fisc is that the injunction itself directs the funds elsewhere in advance." The price of milk always goes from the consumer through the retailer to the processors, not to the government with injunction or without it.

with Rule 15(2) of this Court we mention them briefly.

1. The regulatory accrual remedy is not barred by the Eleventh Amendment under *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

The District Court held that the February 2006 price order issued by ORIL in the middle of this litigation constituted an unconstitutional taking of Suiza's property. *See* Pet. App. at 171a. The Court ordered that unconstitutional regulatory taking to cease by, among other things, reconstructing the erosion that the same had caused on Suiza's capital from the year 2003 which was the base year of the order in question. Suiza submits that compensatory remedies for temporary takings, even if they are (unlike here) paid with State monies present no Eleventh Amendment problem in light of the holding of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). That is the reading afforded to that case by many[8] including

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[8] *See* for example, Fallon, R. H. & Meltzer, D. J., *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1825 & n. 536 (1991) (referring to *First English* by saying: "...the Court rejected the United States' position that, in light of sovereign immunity, the just compensation clause should not be interpreted to require a monetary remedy"); Grant, E., *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 NW. U. L. Rev. 144, 201 (1991) (asserting that in *First English* "The Court thus

the Court of Appeals for the First Circuit. *See Parella v. Retirement Board*, 173 F.3d 46, 57 (1st Cir. 1999) (Lynch, Cir. Judge) (recognizing while discussing the prospective– retrospective conundrum of the Eleventh Amendment that in *First Lutheran* the Supreme Court "firmly established" that "the Takings Clause also requires just compensation for temporary takings (which would seem to be irreducibly retrospective)").[9] *See Tenoco Oil Co. v. DACO*, 876 F.2d 1013, 1027 n.20 (1st Cir. 1989). ("The Supreme Court... has held that damages are retrospectively available for the period of 'temporary' takings, *i.e.*, regulatory takings ultimately

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"recognized" our first reformulated postulate associated with sovereign immunity: independent of congressional action, citizens have a judicially enforceable right to just compensation from the government, by virtue of the Constitution"); Merrill, T.W., *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 981 & n.351 (2000) (citing *First English* for the proposition that "...the Takings Clause has been held to incorporate a self-executing waiver of state and federal sovereign immunity against claims for monetary compensation"); Jackson, V. C., *Seductions of Coherence, State Sovereign Immunity and the Denationalization of Federal Law*, 31 Rutgers L.J. 691, 724 n.126 (2000) (citing *First English* for the proposition that "notwithstanding sovereign immunity, the Constitution 'dictates' a remedy for takings of property"); Jackson, V. C., *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 115 & n.454 (1998) (stating that *First English* strongly suggests that States lack sovereign immunity from just-compensation claims in federal court).

[9] This categorical statement by Judge Lynch on behalf of a unanimous Court of Appeals in *Parella* is difficult to reconcile with her dissent in the case before this Court.

invalidated as unconstitutional by the courts."). *See* also, *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1011-1012 (1992); *Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning*, 535 U.S. 302, 347 (2002), (Rehnquist, CJ, dissenting) and *Stop the Beach v. Florida*, 130 S. Ct. 2592, (2010) (Kennedy J., concurring).

2. The remedy objected to by petitioners is indispensable to set prospective rates. As such it is not a retrospective remedy.

Without the regulatory accrual to reconstruct depleted capital any prospective rate will be insufficient to provide a reasonable profit to respondents. The remedy is thus prospective.

In a free milk market, respondents' revenue and resulting profit would come from charging for their products as high a price as the market would bear. Whatever revenue requirements respondents may have, would come directly from the amount they get from the consumer according to the laws of offer and demand.

But in Puerto Rico's regulated milk market the laws of offer and demand have been displaced. The margin between cost and price to the consumer is determined by the government. The government is constitutionally required to set a margin that provides the regulated entity an opportunity to make a "reasonable" profit. *See* Pet. App. at 164a-171a and authorities therein cited.

To provide for the recovery of cost is a rather simple operation for ORIL. The amount of allowed costs divided by the units of product to be sold produces a price that permits respondents to break even. But the problem comes in determining what additional amount respondents should receive in order to make a "reasonable" profit. After ORIL has provided a cost recovery price, it calculates the reasonable profit by multiplying a preselected percentage of return ("ROE") by respondents' combined capital.

Both elements of the profit calculation are important. An underestimated ROE percentage provides an insufficient profit margin. But the same happens with an underestimated capital base. *X* percentage of 10 is always less than *X* percentage of 100. A negative capital base produces no profit at all.

The February 2006 ORIL price order, which has as a regulatory base respondents' operational numbers for the year 2003, eliminated valid costs incurred by Suiza in an arbitrary, irrational and discriminatory manner in order to turn an operational loss into a profit. *See* Pet. App. at 110a-111a.

These actions provoked a substantial depletion of respondents' capital. *See* Pet. App. at 118a. In a free market, that depletion would probably result in a substantial increase in prices. But that is not a

solution available to respondents in Puerto Rico's regulated milk market.

It is easy to understand what would happen with the District Court's prospective regulated market remedy if the regulatory accrual starting with the depleted base year 2003 is not allowed. Not even ORIL denies that in a regulated market, Suiza is entitled to prospectively recover costs *and* make a reasonable profit. The first step in the latter direction is to determine the percentage of ROE that Suiza should receive for a milk production facility operating under the economic conditions of Puerto Rico. But, as we have seen, the percentage figure is only half the story. The actual prospective profit to be received by Suiza varies enormously with the same return on equity percentage figure depending on the capital base to which that figure is going to be applied. Suiza's present capital base has been eroded so severely that a negative capital number results.[10] In other words, for Suiza to actually recover prospectively a reasonable profit in addition to its costs, its regulatory equity base has to be positive and real, that is, reconstructed to what it would have been today but for the intentional, unconstitutional confiscatory actions of ORIL. If

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[10] Pet. App. at 24a. Even ORIL's expert witness, Dr. Ronald W. Cotterill, recognized that: "...and on the other hand of the balance sheet they had total liabilities plus equity equal, by definition, equal to those total assets, and at that time a net worth was a negative $5 million, so that was part of that side of the balance sheet" (Transcript of February 17, 2009 hearing, p. 8, lines 24-25 to p. 9, lines 1-4).

Suiza is to recover the necessary percentage of ROE over an unconstitutionally eroded regulatory equity base, Suiza would not be recovering prospectively its constitutionally mandated revenue requirement. The regulatory accrual remedy of the District Court is thus prospective inasmuch as it is indispensable to prospectively remedy ORIL's unconstitutional actions.

If "...relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury", *Papasan v. Allain*, 478 U.S. 265, 278 (1986), then such a relief when, the state treasury is in no way compromised, is unobjectionable.

The contention that this relief is prospective because it is necessary to rebuild respondents' capital base is not, as petitioners suggest, one that could almost always be made when a court awards retrospective monetary relief. *See* Pet. Brief at 16.

The reconstruction of the capital base is an issue here simply because respondents operate within a regulated market. It is in a regulated market that the "reasonable profit" results directly from having an adequate capital base allowed by the Regulator as a necessary investment for the regulated activity. In a free market, the concept of "reasonable profit" plays no role since every entity seeks to maximize its profit and charge for its product as much as the market will bear. In a free market environment,

whatever revenue requirements for capital reconstruction, or otherwise, respondents may have, would be satisfied from the maximum price for their product they can extract from the consumer. In short, the argument that the remedy is prospective because without it no reasonable profit is possible prospectively, is one that can be made only by the very small number of entities that operate within regulated markets of this same sort.

3. ORIL is precluded by waiver from raising any Eleventh Amendment defense.

The agreement entered into between ORIL's expert and the experts for respondents constitutes a waiver by ORIL of its Eleventh Amendment defense.

During the month of August 2008, compliance hearings on this preliminary injunction were to be held before the District Court. At the behest of the Court the expert working for ORIL and the experts working for Suiza met with the purpose of narrowing the differences between the parties in connection with the last price order and proposed regulation. *See* U.S.D.C. Dkt. No. 1002 and U.S.D.C. Dkt. No. 1004. Also, s*ee* U.S.D.C. Dkt. No. 1164.[11]

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[11] The District Court stated in an order, denying the request to stay the compliance hearings, U.S.D.C. Dkt. No. 1164, p. 3: "... on August 25 and on August 26, 2008 the experts after a long conference signed an agreement which simplified the compliance hearings as to rate of return. (Docket No. 1002, Minute; Docket 10[0]3, Experts Agreement)."

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As expected by the District Court, a meeting between the experts produced agreements in several crucial issues substantially narrowing the differences between the parties. That agreement was reduced to writing and delivered to the District Court with the signatures of the experts. The Court entered the agreement into the docket. U.S.D.C. Dkt. No. 1003. (Transcript of August 26, 2008 hearing, p. 17, lines 14-25 to p. 18, lines 1-3). Although the actual percentage value of the return on equity to be used for each of the operating years between 2003 and 2007 was not agreed to, the parties did agree on the methodology for the calculation of the regulatory accrual and most importantly for the use of that result for the reconstruction of the present capital base of Suiza, over which a return on equity going forward would be applied. U.S.D.C. Dkt. No. 1003, Experts' Agreement, par. 1 (c), incorporating a table entitled "Estimated Regulation Accruals and Adjusted Capital base: 2003-2007". After the agreement, all the experts have used that methodology to reconstruct Suiza's capital. Transcript of February 17, 2009 compliance hearing, p. 11, lines 9-13. ORIL's expert witness admitted:

> Q. And if I look at the reconstruction of capital that you have done in this document, you're still - or as you always did - using the regulatory accrual to reconstruct captain [sic], right?

A Yes.[12]

...

Q. Now, going to capital, we need to reconstruct capital by capitalizing the regulatory accrual at the end of the exercise, right?

A. At some point in the exercise, yes.[13]

During a hearing held on January 12, 2009 the District Court indicated to the parties that the remaining controversies would be limited to those not already resolved in the experts' agreement.[14] Lastly, during yet another post injunction evidentiary hearing, ORIL's counsel accepted that the use of the regulatory accrual as the correct method to calculate Suiza's present capital base was agreed to. Transcript of compliance hearings of February 16, 2009, p. 11, lines 9-13. ("...but during the course of the discussions between the experts, I conceded on, when was it, Thursday that the capital base issue was, and the methodology to get to the capital base, was agreed").

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[12] Transcript of hearing held on February 18, 2009, p. 25, lines 22-25 to p. 26, line 1.

[13] Transcript of hearing held on February 18, 2009, p. 45, lines 14-15, and p. 69, lines 3-6.

[14] Transcript of hearing held on January 12, 2009, p. 41, lines 23-25 to p. 42, lines 1-4

ORIL cannot now come and raise an Eleventh Amendment defense against the regulatory accrual. ORIL has already accepted that, without the regulatory accrual, Suiza's present capital base cannot be correctly recalculated and thus Suiza cannot obtain the constitutionally mandated revenue requirement going forward. ORIL stipulated almost all of the regulatory accrual calculation elements. ORIL's action constitutes a recognition that the regulatory accrual remedy is prospective in nature and its acceptance of the same in the expert's agreement constitutes a waiver of any Eleventh Amendment defense it may have had in connection with the same.

A waiver of immunity can occur (1) when there is a clear declaration by the State that it intends to submit itself to the jurisdiction of a federal court; (2) by consent to or participation in a federal program for which waiver of immunity is an express condition; or (3) by affirmative conduct in litigation. *Clark v. Barnard*, 108 U.S. 436 (1883); *Lapides v. Board of Regents*, 535 U.S. 613 (2002); *Welch v. Texas Department of Highways and Public Transport*, 483 U.S. 468 (1987); *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). Consent by conduct in litigation may occur when the state affirmatively complies with a court's implementation order. *Garrity v. Sununu*, 752 F.2d 727 (1st Cir. 1984). Voluntary entry into an agreement may also have the effect of waiving immunity through conduct. *New York State Ass'n. v. Carey*, 596 F.2d 27 (2d Cir. 1979); *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989).

4. ORIL created absolutely no record for its contention that it is an "arm of the State" for Eleventh Amendment purposes.

As demonstrated by f/n. 22 of Suiza's Brief before the Court of Appeals, Suiza specifically preserved the argument that ORIL had created no record before the District Court to support the contention that it was an arm of the State. ORIL had to develop a record on that issue. *See Ainstworth Aristocrat International Party v. Tourism Company*, 818 F.2d 1034, 1038 (1st Cir. 1987); *Figueroa v. Aquino*, 863 F.2d 1037, 1044 (1st Cir. 1988); *Fresenius Med. Care v. Puerto Rico & Caribbean Vascular Center Corp.*, 322 F.3d 56, 61 (1st Cir. 2003) *cert. den.* 540 U.S. 878 (2003). Failure to develop this record is fatal to ORIL's belated Eleventh Amendment argument.

Other circuits have expressly stated the need to develop a record on the arm-of-the-state issue. *See Gray v. Laws,* 51 F.3d 426 (4th Cir. 1995); *Pikulin v. CUNY*, 176 F.3d 598 (2d Cir. 1999) (remanding because "defendant should develop a record sufficient to allow the district court to consider fully [defendant's] relationship to the state."); *Gragg v. Kentucky Cabinet for Workforce Development, et al.,* 289 F.3d 958 (6th Cir. 2002) ("defendants have pointed to nothing on the record, and we have been unable to find anything on the record that would establish that they are arms of the state entitled to the protection of the Eleventh Amendment"); *East Central Health District v. Brown*, 752 F.2d 615 (11th

Cir. 1985) (District Court's denial of dispositive motion affirmed since the record did not establish an adequate factual basis to determine that defendant was an arm of the state).

5. This is not a matter of exceptional importance requiring this Court's intervention especially at this stage of the proceedings.

The principles embodied in the Eleventh Amendment are certainly important. But the Eleventh Amendment is not compromised in any way by the decision of the Court of Appeals. Petitioners have cited no authority for the proposition that a monetary award coming in the form of an increase in the price of goods paid for by the consumer to a private entity in the context of a regulated market compromises "directly or indirectly" public funds.

Petitioners and *Amici* are mistaken in alleging that this remedy equals a federal court ordering the imposition of a tax on citizens to pay damages. As recognized by the Court of Appeals, "...whether Puerto Rico could levy a special tax to compensate Tres Monjitas and Suiza is not the issue before this court". *See* Pet. App. at 27a. Monies collected by the government on account of a tax are State funds no matter the nature of the public purpose for which they are going to be used. But the regulated price of milk goes up and down for many reasons and those price changes cannot be qualified as tax imposition

or tax relief measures. They are changes in the amount paid by the public to a private entity whenever the public buys a commodity. Simply, rate making and tax imposition and collection are two entirely different government activities. The analogy does not work.

Finally, the impact of this decision is limited to the narrow realm of regulated markets. All the obligations of the Commonwealth of Puerto Rico under the injunction would disappear if Puerto Rico were to deregulate the prices of milk today. The decision to regulate or not to regulate the market is Puerto Rico's alone. But deregulation means that revenue will depend on the vagaries of the free market, reconstruction of regulatory capital would be meaningless and respondents would be obligated to fend on their own for their revenue needs. That is the case for all claimants outside the narrow realm of regulated markets. The decision of the Court of Appeals has no impact in free market situations where most of the Eleventh Amendment issues arise.

V. CONCLUSION

There are no valid reasons for this Court to issue the writ of certiorari to review an interlocutory decision of the Court of Appeals in a still ongoing case particularly where the remedy under attack has not even been fully implemented. It is not even clear that petitioners here are covered by the Eleventh Amendment. The Eleventh Amendment does not apply because no government monies are implicated

here in any way and any "retrospective liability" falls upon the private resources of the milk buying public. The remedy is consistent with the rulings of this Court and there are no conflicts with decisions from other circuits. This case has no impact outside the limited realm of regulated markets.

The petition for certiorari should be denied.

Respectfully Submitted,

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